HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

A.O. No. 1055/01
(Old No.1011 of 1986)

State of U.P.
Vs
M/S Kohinoor Transporters

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 15.12.2006

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

A.O. NO. 1055 OF 2001
(Old No.1011 of 1986)

State of U.P. through
Superintending Engineer,
Yamuna Civil Construction Circle,
Dehradun. .....Appellant.

Vs.

M/s Kohinoor Transporters,
10 Saharanpur Road,
Dehradun. .....Respondents.

15.12.2006

Coram: **Hon'ble Rajesh Tandon, J.**
Hon'ble B.C. Kandpal, J.

Per Rajesh Tandon, J.

Heard Standing Counsel for the State and S.K. Jain, counsel for the respondent.

2. Present appeal has been filed against the judgment and order dated 30.08.1986 passed by Sri J.C. Sharma, P.C.S. (J), IV Civil Judge, Dehradun in Original Suit No. 346 of 1984 M/s Kohinoor Transporters v. State of U.P. and connected Misc. Case No. 123 of 1984 State of U.P. Vs. M/s Kohinoor Transporters whereby the Court has refused to set aside the award given by the Arbitrator in the case which was referred to the Arbitrator to decide the dispute between the parties.

3. Briefly stated, an agreement was entered for excavation of foundation of Khara Power House between the respondent and the appellant through the

Superintending Engineer Yamuna Civil Construction Circle, Dehradun. The Contractor submitted claim for Rs. 1,11,12,500/- for the work done by him.

4. The Executive Engineer, Power Channel Construction Division-II invited tenders for the work of excavation of the power house site of Khara Project. Consequent to this, agreement No. 2/SE/80-81 was signed between the claimant and the respondent no. 2 on 22.09.1980. Thereafter, the claimant has started the work of excavation at the site given by the respondent no. 3 on 11.10.1980. Initially the work was started by the claimant at the site as provided under the agreement, later on Central Line of the power line was established by 50 metres upstream of the site provided in the agreement after few months of actual start of work.

5. As a result of the shifting of the power line by 50 metres, the same has changed the entire scope of the work and the basic conditions as mentioned in the agreement were completely changed and this change was immediately brought to the notice of the authorities by the claimant by sending several reminders in writing, but no reply was received.

6. As a result of the change of the site by 50 metres upstream pushed the location of power house from high into the hills and into the hard rocks necessitated excavation in strata other than specified in the agreement. The excavation work consists of removal of power, hard rocks, which needed the use of drilling,

planting, ripping, use of explosives and use of excavators, which increased the cost of excavation tremendously.

7. The Contractor brought to the notice of the appellants and inspections were also carried out but no decision was taken by the appellants and the claimant was forced to continue the work.

8. According to the claimant soon after the site was shifted by 55 metres upstream impressed upon the respondent no. 2 and 3 time and again both verbally and in writing that the change of site rsulted in the change of the entire scope of work and thus all work done which was not provided in the agreement is an extra item of work. Superintending Engineer Yamuna Civil Construction Circle, and Executive Engineer, Khara Project Constn. Division-I neither agreed nor refused the above fact but verbally they had agreed that the change of the site by 55 metres upstream would mean that all work so done would be an extra item of work and would be settled as a claim. The claimant has stated that the change also resulted in the character of excavated material. The excavated material changed from that of excavation mixed with sand, shingle, boulders etc. to that excavation in pure hard rock.

9. Complainant has further stated that this change was also brought to the notice of Superintending Engineer as well as Executive Engineer, but due to in action on their part, the matter could not be sorted out and they were forced to continue the work of excavation. The change of excavation in shifting the hard rock is

recorded in level book by the Executive Engineer and can be verified at site inspection even now. Complainants have excavated through large mass of solid hard rock in the shifted reach.

10. The Contractor, therefore, on account of the change of the site has claimed himself to be entitled for extra item of work and lot of difficulties having been found during excavation work at out places than provided in the agreement. The claim was made by the Contractor to the following effect:

> "17. That the claimant therefore is entitled for the following reliefs on account of this change of site and consequent change of scope of work.
>
> (A)- In the reach not covered by agreement from the time of starting excavation till 25.10.1983, 2.5 lacs Cu.M. of hard rock has been excavated. The excavation involves the use of drilling, blasting and ripping. The claims on this account is worked out below:-
>
> (i) Additional cost involved due to use of process of blasting ripping etc. at Rs. 20.70/Cu.M. Rs. 20.70/Cu.M.
>
> C.O. Rs. 20.70/Cu.M
>
> (ii) Additional cost due to extra lifts, a total of 76 lifts are involved in the process of excavation in the extended reach. The cost/lift works out to Rs. 0.195/lift. Therefore

An additional expenditure
For 76 lifts
=76X0.195=Rs. 14.82/Cu.M. Rs. 14.82/Cu.M

(iii) Expenditure on transportation
On account of lead involved in
shifted reach is Rs. 8.40/Cu.M.
and Rs. 2.34/Cum. For 2 Km. Of
Kachha lead/ton of material
Hauled. Therefore, the additional
amount payable is
=Rs. 8.40+Rs.2.34=10.74/M.T.
of material hauled. 1 cum.
Of material weighs two M.T.
Therefore additional rate/
Cu.M. works out to Rs.10.74X2
=21.48/Cu.M. Rs.21.48/Cu.M

The amount payable on 2.5 lacs Cum.
of excavation in the shifted reach will be
the total of that calculated on the
basis of rates provided above
in (i) (ii) and (iii) i.e. ....Rs. 57.00/Cu.M

(iv) Cost of 2.5 lacs Cu.M. of
excavation at Rs. 57.00/Cu.M Rs.1,42,50,000/-

(v) against above we are being
paid Rs. 15.60/Cu.m. Thus the
total payment received is :- Rs. 39,00,000.00

(vi) Thus the nett amount due to
us = 1,42,50,000 (-)
Rs. 39,00,000= Rs. 1,03,50,000/-
Rs. 1,03,50,000.00

11. The claimant, therefore, has claimed to the following effect from the Arbitrator:

"Since the scope of work has changed entirely and the conditions of the agreement do not apply due to change of site, anything which effects the cost of excavation need be compensated to us by payment of such additional cost effecting the excavation. These factors are due to rise in cost of:-

(a) Labour

(b) Petrol Oil, lubricants and diesel fuel.

(c) Increase in the cost of tyres and tubes.

(d) increase in the cost of establishment.

The increase/Cu.M. in the cost of excavation on account of the above factors are worked out below:-

(a) increase in the cost of excavation due to increase in the cost of labour ... Rs.2.00/Cum.
C.O. Rs.2.00/Cum.

(b) *increase in the cost of excavation due to increase in the cost of petrol oil, lubricants and diesel fuel ...Rs.3.00/Cu.M.*

(c) *Increase in the cost of excavation due to increase in the cost of tyres and tubes .....Rs.0.75/Cu.M.*

(d) *Increase in the cost of excavation due to increase in the cost of spare parts of earth moving machinery .....Rs. 1.50/Cu.M.*

(e) *Increase in the cost of excavation due to increase in the cost of maintenance of establishment. .....Rs. 0.50/Cu.M.*

Total Rs. 7.75/Cu.M.

The total increase in the cost of excavation due to increase of prices of various ingredients enumerated above is Rs. 7.75/Cu.M. This amount of

Rs. 7.75/Cu.M. is payable to us on the excavation done by us.

18. That upto date excavation till 25.10.83 is 7.0 lacs Cu.M. The amount payable to us on account of this claim is (Rs. 7,00,000-Rs. 2,50,000)X 7.75=Rs. 34,87,500.00 which kindly be awarded to us by the Hon'ble Arbitrator.

To sum up it is respectfully prayed that :-

(i) An award of Rs. 1,03,50,000.00 be given against the Oppoiste Parties to the claimant on account of excavation of 2.5 lacs Cu.M. of hard rock.

(ii) An award of Rs. 34,87,500.00 be given against the Opposite Parties to the claimant on account of rise in prices of various ingredients which go; into the excavation. This claim arises out due to the delay in the completion of work, the responsibility of which is solely of respondents.

(iii) sanction of a rate of Rs. 57.00/Cu.M. for excavation done after 25.10.1983.

(iv) Pendentilites and interest on the above amount of work calculated at the rate of 24% per annum which is the usual money lending rate in the market.

(v) All cost of proceedings of arbitration to be paid by the Opposite Parties to the claimant.

(vi) Any other reliefs which the Hon'ble arbitration thinks fit."

12. Counsel for the appellant has relied upon Clause 16 of the agreement on the ground that no claim can be allowed to the contractor for the additional work. Few Clause of the agreement are quoted below:

> *"That he started the work of excavation as per drawings attached with the agreement on 11.10.1980. As soon as he was informed (verbally) by the site engineers about the shift of the centre line of power house on the upstream by 55 m and enlargement of the pit etc. he brought to their notice that the strata of the extended reachw as very hard (hard rock) and required heavy blasting and that depth of excavation at the centre line was about 20-15 meters more than provided in the agreement. That the ……hard rock and additional 20-25 meters cutting was nto provided for by him while submitting his tender rate. That this shift had changed the entire scope of work, and it had affected the financial aspects and the progress as well. That in his contracted rate this hard strata and 20-25 meters of additional cutting was not included. This he brought to the notice of the authorities repeatedly in his letters dated 25.3.1981, 19.5.1981 and 2.8.1981. That the Executive Engineer in his reply dated 29.5.1981 and 29.6.1981 did not refute the contentions of the claimant regarding shifting of the centre line of the power house on the upstream by 55 m, extra hard nature of the rock in the extended reach and the additional 20-25 ms. depthof excavation. The Executive Engineer merely stated that as per condition 4.01 of the detailed specifications the*

drawing had been modified; and further that as per para 3.01 no claim was admimssible to the contractor for the changes. The contractor further submitted that on accouint of the hard nature of rock in the extended reach he borrowed from the department on rental D355-A Kamatsu Tractor for ripping purpose and used it for one month although its further ruse was not permitted. That he time and against submitted to the department for additional rate for excavation in the extended reach, stating that the content of rock encountered in the extended reach was 80% against 35-40% in the original reach (22.3.1982). That this fact was ot disputed/refuted by the Respondent. The Respondent only mentioned (30.4.1982) that site of work was defined in para 3.01 of the detailed specifications of the agreement and that it had not been changed. The contractor again represented to the Department on 25.5.1982 and 4.7.1982 for additional rate, details fro which were given. The Executive Engineer on 2.9.1982 asked the contractor for detailed analysis of rates with full justification for extra rates etc. and that this was done by the contractor by his letter dated 22.9.1982. This claim was not admitted by the Executive Engineer vide his letter dated 7.10.1982. It was on a further representation dated 23.10.1982 by the contractor, that the Executive Engineer by his letter dated 4.11.1982 asked the contractor to apply for arbitration in respect of this dispute. The Contractor has further submitted that the Respondent at no stage, either before the

arbitration proceedings or during the proceedings has refuted the facts of the case, (extra hard nature of the rock and 80% rock contest in the extended reach and that depth of excavation at new centre line of the power house had exceeded by 20-25 Meters). That the respondent has only held that the said shift of the centre line etc. was permissible as per terms of the contract and that no extra claim was admissible to the contractor on this account. The contractor has further s8ubmited that the department as follow up of the decisions made in the 29.12.1980 meeting must have carried out exploration by drilling of holes up 35 meters depth below foundation level (at the changed site of Power House) and logs of geological Data prepared. The Respondent has purposely held back from the Arbitrator this information as it would otherwise prove the cotnractor's case regarding extra hard nature of rock, and rock content in the excavation being 80% in the extended reach. The Contractor has quoted authorities from the Supreme Court where it has been held that the W.S. must deal specifically with each allegation of fact in the plaint.....if his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted..…… The court may draw an adverse inference if he withholds important documents in his possession, which can throw light on the facts of the issue.'

The Respondent has made his submission in respect of both portions A and B of the issue together. He has submitted that the site of work is

defined in para 3.01 of the detailed specifications and it reads:

3.00 SITE OF WORK

3.01 The Site of work is located about 60Kms. from Dehradun R.S. (NR) and 50 Km. From Saharanpur R.S. (NR). The site is connected by metalled pucca road 6 Km. Long from Badshahibagh on Saharanpur Chakrata Road. The site is on the left bank of River Yamuna downstream of Khara Inspection House at abouit 13.00 Km. Of the power Channel.' After shifting centre line of the power house on the upstream by 55M the new site comes at Km. 13.087 of the power channel, and the same is well within definition of 'Site of Work' as given in the contract.

The provisions for Drawings in thue agreement is given in para 4.00 and 4.001 and is as below:

4.00 DRAWINGS

4.01 The following drawings shall form part of the agreement.

(i) Index map.

(ii) Excavation plan.

(iii) Typical cross section.

(iv) Proposed disposal plan.

(v) Logs of drill holes at Power House Site.

The above drawings may be modified/supplemented by detailed drawings to be supplied by the Engineer-in-Charge from time to tome. No claim shall be admissible to the contractor on account of change of drawing.

The Respondent has submitted that the drawings attached with the tender/agreement were tentative. These were modified and final drawings were supplied to the contractor for execution of work in course of time. The substitution of the tentative drawings by final drawings did not entitle the contractor any claim on this account. The Respondent has submitted that the centre line of the power house was shifted on the upstream by 55 M. on account of proper foundation requirements and the size of the power house pit was enlarged on design considerations, including requirements of hydromechanical equipment.

Clause 16:Alternations specifications and design do not invalidate contract:

The Engineer-in-Charge shall have power to make such alterations to the original specifications, drawings, designs and instructions as may appear to him to be necessary or advise during the progress of work and the contractor shall be bound to carry out the work in accordance with any instructions which may b e given to him in writing signed by the Engineer-in-Charge and such alterations shall not invalidate the contract and any additional work which the contractor may be so directed to be shall be carried out by contractor on the same conditions in all respect on which he agreed to do the main work and at the same rate as per specified in the tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work

bears to the original contractor work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportions. If the additional work includes any item for which no rate is specified hereunder then the contractor shall carry the work at the rate entered in the Schedule of rate of the District but if the Schedule does not contain any rate for such work than the contract shall notbeing such work until a rate in respect of such work has been settled by mutual agreement between him and the Engineer-in-charge with the approval of the officer accepting the contract and if they are unable to agree upon a rate within two weeks from the date when the contractor received the order the Engineer-in-charge may be a notice in writing cancel the order for such work and carry it out in such manner as he may think best in the event of dispute the decision of this Superintending Engineer shall be final and binding on the contractor."

13. Counsel for the respondent in reply to the agreement has submitted that it has not been treated to be an additional work either by the Arbitrator or by the Civil Court while treating the award as a Rule of the Court. He has placed reliance on various letters by which, the change of site, which resulted in the extra works. One of the letters is described as under:

"(i) Letter dated 9th August, 1983 shows that it was brought to the notice of the Executive Engineer from time to time regarding the change of the site. The contents of the letter shows as under:

"That no coming to the actual progress of work, the following facts are once again brought to you kind notice:-

(a) The site of work was changed and was pushed back into the hill is not the site provided in the agreement. Hence the condition provided in the agreement are simply not applicable and needs suitable modifications to suit the present day condition of working by mutual agreement of both the parties.

(b) The time period provided in the agreement for completion of the work has expired since long and the department has not; done any favour to us by giving us extension of time as the delay in completion of the work, if any, has been due to total indecision on the part of the department. Similarly the rates which needed revision on account of change of site has not been granted to us as yet, which needs an immediate decision. The department has failed to take speedy action in the matter of decision, required for day to day working at site. There has been complete discard between the field staff and the design staff. Frequent delays have occurred due to ignorance of the field staff as t what they have to do at site in the absence of construction drawings not forth-coming form the design office.

(c) The contract was for 6.0 lacs Cu.M. of excavation in mixed type of strata and we have already done more than that. You asked us to do 10.0 lacs Cu.M. of excavation, only part of which is in mixed strata and most of which is in pure hard rock, you refuse to pay us for excavation in pure hard rock and even refuse to measure the same in your measurement books according to correct classification of strata.

(d) The agreement not being binding on us due to an entirely different site than what has been provided in the agreement which changed the entire scope of work and you asked us to do the work at the rates provided in the agreement signed in 1980, in the year 1983, when the cost of ingredients which go into the excavation has almost doubled, and deny us to compensate for the same is a denial of natural justice and is not only illogical but amounts to coercion.

In the end we pray to your goodself to take a balanced and just attitude on the subject while pressing for us to maintain the progress. You should equally be effective in settling the problems and pay us what is genuinely due to us and do not deny us the justice.

We confirm again that we shall maintain the best possible progress at site inspite of the denial of justice to us from you end. We request you again to take speedy

action in the matter of settlement and payment of what is due to us. Claims if not speedily settled amount to justice delayed and consequent denial of the same. Your interest on this part of the subject will go a long way in meeting your aspiration regarding the completion of work.

We have continued the work at site practically the same speed inspite of so many barriers created by the department, the Chief barrier, change of site in hill, payment of reduced rates though work has been completed, dishonouring of cheques and non settlement of our claims.

In the matter of disposal and dressing of heeps the same would be taken up as soon as the monsoon are over because the same are not possible at the moment due to very difficult working conditions.

We have also received a Chart along with your letter under reference, detailing the progress of work you desire from us to maintain. We are also very desirous to maintain progress better than this which was fully capable do but we cannot possibly do it for want of settlement of our claims and denial of natural justice."

14. The claimant has also explained in paragraphs 11 and 12 of the rejoinder affidavit regarding regular correspondence, which was made due to the change of the site. The same are quoted below:

“Para 11:- The reply of the respondent against this para is wrong. A few examples of the letters addressed to the Respondent NO. 2 is given below which did not receive their attention as no reply was received for the same.

(a) Our letter dated 4.7.82 appearing as Annexure-XXIV of our claim petition.

(b) Our 3 page letter dated 7.8.82 copy enclosed now as Annexure-X.

(c) Our letter dated 16.11.82 appearing as Annexure-XXXIV of our claim petition.

(d) Our letter dated 17.11.82 sent as reminder to our letter dated 7.8.82 photo copy enclosed now as Annexure-XII.

(e) Our letter dated 17.11.82 sent as reminder to our letter dated 4.7.82 as Annexure-XXXVI of our claim petition.

(f) Our letter dated 9.1.83 sent as reminder to our letter dated 4.7.82 , 7.8.82, 16.11.82 and 17.11.182 photocopy enclosed as Annexure-XV.

(g) Our letter of 6 pages dated 13.5.83 photocopy enclosed now as Annexure XVIII.

These are the some examples of our letters which has been un-replied. Hence the contention of the respondent that they have given suitable reply to all our letter, is wrong.

Para 12:- The reply of the respondent against this para is not admitted. Our contention that the entire scope of work changed due to shifting of site stand un-disputable and we maintain the same.

Difficulties and hazards faced in excavating pure hard rock can be very well understood and needs no discussions. Here lot of excavation involves blasting which itself is a hazardous operations. How the respondent has said that it involves no hazard is to be judged by the Hon'ble Arbitration. It is further to confirm that we have been time and again writing to respondent No. 2 & 3 in the matter of shifted reach. Correspondence would clear the subject. In this connection letters enclosed without claim petition and now are also worth going through in which the matter of shifting of power house site was impressed upon to respondent no. 2 and 3. But no reply was received from the. However, they have not agreed that the site was shifted. Howe shifted position of the power house can be treated as the original position as provided in the agreement and now it is not different to that location, as provided in the agreement, can be very well understood. The site is in a different location altogether and any work done on this different site is an extra item of work. The respondent have agreed in reply to para No. 12 that at the time of submitting tenders, the claimant has acquainted himself with the particular reach that was specified in the tender notice. It is therefore clear that particular reach in defined on page 49 and 57 of the agreement and whatever work is done beyond this, is an extra item of work, as have to blast and break the rock and reduce the large size chunks of rocks to make them suitable for handling, is clearly at site."

15. There is already on the record a letter dated 25.03.1981 addressed by the claimant to the Executive Engineer wherein it was mentioned that the work of excavation was being carried out as per drawing already supplied with the agreement but later on the claimant had been informed verbally that the site of power House pit has shifted to 55 mtrs. Upstream. It was brought to the notice of the Executive Engineer that the stata of this extended reach was very hard (i.e. ahrd rock etc.) and required the heavy blasting. It was further mentioned that nearly 20 meters height was more of this extended reach than shown in the drawing already attached with the agreement. It was pointed out that due to the shifting of site of the Power House pit the entire scope of work had been changed and it had affected the financial aspects and progress of the work as well. It was further pointed out that while tendering the rates of work this hard strata and the extra 20 metres height of cutting of the extended reach was not calculated in the rates quoted by the claimant.

16. Another letter is dated 19.05.1981, which has been addressed to the Executive Engineer which points out that the slopes changed site of work as verbally told by the field officers are criminal sloes and dangerous always and can damage the machines of the contractor at any time. The cutting height is also increased about 20 mtrs and thus the entire scope of work has been changed and the claimants are bearing heavy expenses for this extra work. Annexure VII to the claim petition is another letter by the Contractor to the Executive Engineer which again lodges protest to the effect that the site of the power house

has been changed du3e to shifting of power House site and thus the entire scope of work has been changed. As per previous site the contractor was doing the work but the changed site on very hard strata in which extra cutting of about 25 metrs is involved which was casting very heavy to the claimant for which the department would be liable to pay extra rates.

17. A reply was sent by the Executive Engineer on 29.06.1981 in respect of letter (Annexure No. VII to the claim petition). Point regarding shifting of the site, the hard strata encountered at the new site and the extra cutting involved up to 25 mtrs and heavy expenses being incurred on that account by the claimant and the claim of the contractor for the extra rates has not at all been refuted.

18. The letter dated 2.8.1981 Annexure IX again stressing the change of the site 55 mtrs upstream of the old site, extra hard strata encountered with about 25 mtrs height and the assertion that the entire scope of the work had been changed involving extra cost to the contractor was replied to by the Executive Engineer vide letter dated 29.5.1981 (Annexure-X) by simply stating that the modification of the drawing was according to 4.01 condition of the detailed specifications of the agreement and that according to para 8.01 thereof it specifies that no claim shall be admissible on account of variation in quantities of different types of rocks actually met with. The plea of the Executive Engineer based on condition 4.01 appearing at page 39 of the agreement is wholly misplaced. The change was not limited to the drawings

but it was a wholesale change of the site. The centre line of the Power House pit had been shifted 55 mtrs upstream from its original location and the height of the ground level of the centre line had increased by 20 fts as is evident from the cross-section at page 57 of the agreement. A drawing may modify or supplement the details of the original drawing forming part of the agreement but a drawing cannot be substituted for the drawing of an altogether different site of work which may make the original drawing wholly irrelevant as meaningless.

19. Contractor has again pointed out by the letter dated 08.12.1981 that while in the agreement the quantity of excavation provided for was 6 lac cum the same would now be enhanced to 9 lacs cums due to shifting of the Power House 55 mtrs upstream which had changed the entire scope of work. It was pointed out that the contractor was excavating for extra item accordiong to shifted reach, plan and it was requested that the rate should be sanctioned as per excavation which was being done by the contractor.

20. Vide letter dated 16.12.1981, it was again pointed out that due to extra hard strata at the changed site the break down of shovels had become too frequent which was retarding the progress of the work. The necessity of a ripper was, therefore, stressed once again.

21. In the letter dated 25.3.1982 while once again stressing the fact of shifting of the site 55 mtrs upstream and demanding extra rates for excavation of hard rock

with extra lead and lift, the contractor pointed out that the percentage of the rock had become 80% instead of 40% for which the original agreement provided for.

22. In another letter-dated 29.3.1982, it was once again pointed out that the rock percentage at the changed site was 80% instead of 35% to 40% at the original site and the extra rate was claimed. To this letter, a reply was received from the Executive Engineer.

23. To this letter, a reply was received from the Executive Engineer on 30.04.1982 wherein shelter was taken under para 3.01 of the detailed specification to allege that the site of work was on the left bank of the river Yamuna downstream of Khara Inspection House at about Km. 13.00 of power channel, thus the claim that the hard rock encountered at 55 mtrs upstream form the original centre line of the power House where the work had been shifted was 80% of the total strata instead of 35% to 40% at the original work site was not disputed. The contractor replied to this letter vide letter dated 03.05.1982 wherein it was stated that the contention of the Executive Engineer that the site of work had not been changed and above as defined in the agreement should not be agreed to. The contractor requested the Executive Engineer not to reject the claim of the contractor arbitrarily by taking shelter under condition 3.01.

24. On 25.05.1982, the Contractor submitted a detailed representation to the Executive Engineer claiming extra rates for the excavation at the changed site due to extremely hard strata to the extent of 80% of hard

rock encountered at the changed site. A representation to the same effect was submitted by the contractor to the Superintending Engineer vide letter dated 4.7.1982. A reply was received from the Executive Engineer vide letter dated 02.09.1982 requiring the contractor to submit detailed analysis of rates with full justification in respect of demand for excavation of the hard rock strata at Khara Power House.

25. Vide letter dated 22.09.1982, the Contractor submitted full analysis of rats according to which the cost of excavation in the hard rock strata to the tune of 80% came to Rs. 57 per cum. Besides this, the contractor also claimed price escalation in the cost of labour involved in excavation of the work at Rs. 7.75 per cum.

26. The letter dated 07.10.1982 written by the Executive Engineer shows that the department at no stage disputed the fact regarding the extra work.

27. Taking into consideration, the aforesaid factors Civil Judge has considered that the Arbitrator himself has visited the site as will appear from the order itself. So far as the award is concerned, issue no. 2 was framed by the arbitrator, he has inspected the site on 01.12.1983.

28. The Arbitrator has considered the aforesaid factors by which the site was changed by which the additional amount was claimed.

29. In paragraph 3 of the award, the Arbitrator has observed as under:

> *"3. The Superintending Engineer has reported that:*
>
> *(a) The power house site has been shifted by 55 m upstream.*
>
> *(b) The size of the power house pit at bottom has been enlarged as below:*
>
> *(i) 33.4 M (against origional 35.5 m) along centre line of the power channel.*
>
> *(ii) 52 M (against original 43 M) across centre line of the power channel.*
>
> *(iii) The bottom level has been kept lower at elevation 320M (against original 322.5M)*
>
> *(c) The quantity of excavation for the revised power house pit is 10.64 lac Cubic Metres against 6.0 lac Cubuic Metrers for the original pit.*
>
> *However, the Superintending Engineer has placed NO evidence on record to say as to on what date the decision of the department about shifting the centerline of the power house pit upstream by 55 meters and to change the size, in respect of lateral dimensions and the bottom elevation level of the power house pit was intimated to the contractor for implementation."*

30. Issue no. II, the Arbitrator has framed to the following effect:

> "*Whether or not the site/location centre line of power house pit) of work as given in the agreement is same where the work is being executed now. Whether the centre line of the Power*

House pit was changed only after sometime of start of work:-

The contractor has submitted that the Minutes of the meeting dated 29.12.1980 held at Roorkee between officers of the Design Organisation Roorkee the Project Engineer and the Resident Geologist is proof enough to establish that the site of power house was shifted by 55 M upstream. That the Department at no stage formally communicated to him about the said change. That the respondent in his reply to the claim had admitted that 'That fact of finally fixing the centre line of power house was made known to the contractor as early as June 1981.' That the contract for the work was signed on 22.9.1980 and work was started on 11.10.1980. The stipulated date of completion was 10.4.1982. That the work in the arly period of execution was done as per drawing attached with agreement and that the decision to change site of power house on the upstream was intimated to him ONLY verbally sometime in June 1981, i.e. about 8 months after the date of start and when about 1/3 time of agreement had elapsed.

The Respondent has affirmed that

(1) The centerline of the power house has been shifted upstream by 55 meters.

(2) The size of power house pit (at bottom) has been enlarged room the original 35.5X43.0 to 38.4 X 52.0 meters and that the elevation level o the

bottom of the pit has been lowered from 322.5 to 320 M.

The respondent has submitted that site of work is defined in clause 3.01 of the detailed specifications of the Agreement and it saves as below

> *"The site of work is located about 60 Km. From Dehradun Railway Station (Northern Railway) and 50 Km. From Saharanpur Railway Station (Northern Railway). The site is connected by metalled Pucca Road 6 Km. Long from Badshahi Bag on Saharanpur –Chakrata Road. The site is on the left bank of River Yamuna down stread of Khara Inspection House at about 12.00 Km. Of the power Channel."*

He has submitted that though the centre line of the power house has been shifted on the upstream by 55 Km., as compared to that tentative drawing attached with the agreement, yet the site of work remained the same. By fixing the centre line of the power House finally its challenge comes at Km. 13.087 of the power channel, which is downstreat of it the location about 13.0 Km. Provided in the agreement.

The contractor has made further two submissions in respect of the above contention of the respondent.

The drawing which formed part of the agreement cannot be considered tentative. There is no provision in the agreement for shifting the site upstream or downstream. Further that the site is finally defined in the agreement, including drawings and it has many financial implications like:-

Condition No. 7 of the instructions to Tenderers which form a part of the Agreement says-

"Tenderers in their own interest, are advised to see the site, work and acquaint themselves with the ...soil and materials ……and study……drawing etc. before tendering as no claim on this account will be entertained.

Condition No. 1.04 of special conditions of contract says:

"It shall be understood that the contractor has satisfied himself as to ……..physical conditions at site, configuration and conditions of ground, the character, quality and quantity of the surface and the sub-surface materials to be encountered, the character of equipment and facilities needed in the beginning and during execution of the work and all other matter which can in any way effect the work and all other matter which can in any way affect the work or the cost thereof.'

The logs of drill holes form part of agreement. They supply information in respect of the material which is required to be excavated. This information is relevant ONLY to the site which is precisely defined in the agreement.

By shifting the centre line of the power House on upstream by 55 meters, all the above provisions of the agreement which relate to the work as defined in the agreement and materially affect the cost of excavation, are thrown out.

The cross section at centre line of the power house, where excavation was started, is given in the agreement and the average elevation is about 358 Ms. By shifting centre line of the power hoe on the upstream by 55 Ms, the ground level has risen high to about 378 Ms. The depth of excavation at centre line has increased from

original 35.5 M (358-322.5) to 60 (378-320) meters, i.e. it has increased by about 25 meters."

31. Issue No. III was framed to the following effect:

"*The Contractor has made submissions separately for the two portions of the issue.*

(A) "Whether the claimant is entitled for any additional amount by way of escalation over and above the contracted amount for the quantity of work provided in the agreement."

32. The Arbitrator has recorded the findings to the following effect:

"The Contractor has further submitted that the delay in completion of the contracted quantity of work before the stipulated date of completion as provided in the agreement is on account of the shifting by the respondent of the centre line of the power house on the upstream by 55 m sometime in June 1981 i.e. about eight months after the start of work on 11.10.1980 and enlargement of the size of pit and that the respondent was fully responsible for it. That he is required to execute the contracted work in period beyond the stipulated date of completion under circumstances for which the sole responsibility is of the department. That price of labour, machinery and matieral required for execution of the work in the period beyond 10.4.1982 have increased and that he is entitled for compensation of such additional costs.

(B) Whether the claimant is entitled for a different rate for the quanity of work done byhim beyond those provided in the agreement due to change of the centre line

of the pwor house pit and which has been claimed as an extra item of work due to alleged change in the scope of work? If so, what this rate should be.

The claimant, on this issue has submitted as follows:-

He has further submitted that 'Excavation' work is defined in Schedule C of the agreement and it reads:

"Excavation in all types of strata mixed with sand shingle, bounders, clay, shale and rock, sand stone, silt stone and other all other types of rock dry, wet or saturated and is disposal with all leads and lifts as per enclosed specifications."

That the contractor's contention about extra hard rock and the higher content –80% of rock in the excavation in the extended reach occasioned by shifting centre line of the Power House on the upstream by 55ms was fully covered and provided for in the contracted item of 'Excavation' work.

The Respondent has submitted that in view of the above mentioned stipulations of the agreement, the work of Excavation in the extended reach could not be treated as an Extra item and that no extra rate over and above the contracted rate was admissible to the contractor."

40. The Civil Court while passing order dated 30.08.1986 has recorded a finding to the following effect:

"The arbitrator himself visited this work are and not only on the bass of his personal observations of the strate but also on the basis of blasing and tunneling done with the help of heavy machines, the arbitrator came to the

conclusion that the entire scope of the work was changed and the work to be done was an extra item of work. The arbitrator has also considered the defamation of “site” as given in the agreement and also of “work area” and has rightly come to the conclusion that the work area was preciously defined by boundary marks and pillars and any contractor could have based is rates only on the basis of the specifications. Thus it cannot be said that there was any .....in the assumptions made by the arbitrator. As regards clause – 16 of the agreement, on perusing it minutely it is apparent that only powers which was reserved in it by the department were of making such “alternations” additions in the original specifications, drawings, designs and instructions as may appear to be necessary and advisable. Thus these powers related to the minor adjustments of specifications, designs and drawings in the existing area. By invoking this clause the Deptt. could not have shifted the site of work 55 mtrs. upstream, it could not have lowered the bottom elevation and side elevation. Thus with regard to these findings I do not find that there is any misconduct or wrong – assumptions by the arbitrator.

41. Relying upon ***State of Rajasthan v. Puri Construction Co. Ltd. (1994) 6 SCC 485*** *in* ***Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd. (2006) 7 SCC 700,*** *the Apex Court has held as under:*

> *“However, in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the*

conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. If a question of law is referred to arbitrator and the arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. An error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award."

42. In ***B.V. Radha Krishna Vs. Sponge Iron India Ltd. AIR 1997 SC 1324,*** the Apex Court has observed as under:

"11. The disposal of the matter by the High Court in the manner shown above does not come within the ambit of Section 30 of the Arbitration Act. This Court, time and again, has pointed out that the scope and ambit of Section 30 of the Act. In State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485 : (1994 AIR SCW 5061), after referring to decisions of this Court as well as English cases, the Court observed as follows (Para 11 of AIR):--

On the scope and ambit of the power of interference by the Court with an award made by various decisions have been made from time to time by law Courts of India including this Court and also by the Privy Council and the English Courts. Both the parties have referred to such decisions in support of their respective contentions. The factual contentions of the respective parties are proposed to be scrutinized and then the facts are proposed to be tested within the conspectus of judicial decisions governing the issues involved."

12. This Court again observed in paras 26-28 (of SCC) : (Paras 25-27 of AIR) as follows:-

"The Arbitrator is the final arbiter for the disputes between the parties and it is not open to challenge the award on the ground that the Arbitrator has drawn his own conclusion or has failed to appreciate the

facts. In Sudarsan Trading Co. v. Government of Kerala, (AIR 1989 SC 890), it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the Arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the Arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court canot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties (Emphasis supplied). Whether a particular amount was liable to be paid is a decision within the competency of the Arbitrator. By purporting to construe the contract the Court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a amount awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the Court. Where the reasons have been given by the Arbitrator in makng the award the Court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The Arbitrator is the sole Judge of the quality as

well as the quantity of evidence and it will not be a Judge on the evidence before the Arbitrator."

43. In ***Municipal Corporation of India v. Jagan Nath Ashok Kumar (AIR 1987 SC 2316),*** it has been held by the Apex Court that appraisement of evidence by the Arbitrator is ordinarily never a matter which the Court questions and considers. It may be possible that on the same evidence the Court may arrive at a different conclusion than the one arrived at by the Arbitrator but that by itself is not ground for setting aside the award. It has also been held in the said decision that it is difficult to give an exact definition of the word 'reasonable'. Reasons varies in its conclusions according to the idiosyncrasies of the individual and the time and circumstances in which he thinks. In case not covered by authority the verdict of jury or the decision of a Judge sitting as a jury usually determines what is 'reasonable' in each particular case. The word reasonable has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably known or ought to know. An arbitrator acting as a Judge has to exercise a discretion informed by tradition, methodized by analogy, disciplined by a system and subordinated to the primordial necessity of order in the social life. Therefore, whose reasons genuine and relevant for the Arbitrator to hold the manner he did, have been indicated, it cannot be said that the reasons are unreasonable.

44. In ***Hindustan Construction Co. Ltd. v. Governor of Orissa (1995) 3 SCC 8: (1995 AIR SCW 1575),*** this Court observed on the scope of interference by the Court as follows (at p. 1582 of AIR):-

> "It is well known that the Court while considering the question whether the award should be set aside, does not examine the question as an appellate Court. While exercising the said power, the Court cannot reappreciate all the materials on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case the award in question could have been made. Such award can be set aside on any of the grounds specified in Section 30 of the Act.

45. Relying upon ***State of Rajasthan v. Puri Construction Co. Ltd. (1994) 6 SCC 485*** in ***Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd. (2006) 7 SCC 700,*** the Apex Court has held as under:

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47. In ***Coimbatore District Podu Thozillar Samgam Vs. Bala Subramania Foundry and others reported in A.I.R. 1987 Supreme Court 2045,*** it has been held as under:

"An award can only be set aside where there is an error on its face. Further, it is an error of law and not mistake of fact committed by the arbitrator

which is justiciable in the application before the court. It is an error of law and not mistake of fact committed by the arbitrator which is amenable to corrections by the Court.

Where the alleged mistakes or alleged errors, if there be any of which grievances were made were mistakes of fact if at all, and did not amount to error apparent on the face of the record, the objections were not sustainable and award could not be set aside."

48. In ***Puri Constructions Pvt. Ltd. Vs. Union of India reported in AIR 19 89 Supreme Court 777*** and in the case of ***Food Corporation of India Vs. Joginderpal Mohinderpal and another AIR 1989 S.C. 1263*** has held that -

"*It is not necessary for a court to examine the merits of the award with reference to the materials produced before the arbitrator. The Court cannot sit in appeal over the views of the arbitrator by re-examining and reassessing the materials.*"

49. In view of the above, it cannot be said that the Arbitrator has misconducted in passing the award so as to interfere in proceedings under Section 30 and 33 of the Arbitration At. The award given by the Arbitrator is a reasoned award and it has been fully established that the work of excavation in the extended reach could not be treated as an extra item and in spite of the letters given by the Contractor, the Contractor was never asked to stop the

work. He has proceeded with the work. The claimants are stopped from challenging the claim.

50. In view of the above, the jurisdiction under Section 39 of the Arbitration Act being limited and we cannot enter into the findings of fact arrived at by the Arbitrator confirmed by the Civil Court.

51. We find no merit to interfere so far as the interest part awarded by the Arbitrator as well as courts is concerned while making the award as the rule of the Court. Arbitrator as well as Courts below have rightly awarded the interest. No other points have been pressed in the cross objection.

52. The appeal lacks merit and is dismissed. No order as to costs.

(B.C. Kandpal, J.) (Rajesh Tandon, J.)

15.12.2006

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